

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463
Montgomery, Alabama 36130-1463
(334) 271-7700 ■ FAX (334) 271-7950

January 13, 2015

Docket Coordinator, Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office (Mail code 5305T)
1200 Pennsylvania Avenue NW
Washington DC 20460

RE: Proposed NPL Listing
35th Avenue Site, Birmingham, AL
Docket ID No. EPA-HQ-SFUND-2014-0623

Dear Sir/Ma'am:

The United States Department of Environmental Management (EPA) published a proposal to list the 35th Avenue Site (the Site), located in Birmingham, Alabama, on EPA's National Priorities List (NPL). This proposal for NPL listing was published in the Federal Register on September 22, 2014. The initial comment period deadline was set for November 21, 2014. ADEM requested an extension of the comment period in order to afford an opportunity for the State of Alabama, through ADEM, to invoke EPA's issue resolution process memorialized in what is known as the "Fields Memorandum,"¹ as well as to allow reasonable time for analysis of scientific data. In addition, Alabama's Governor, Robert Bentley, and the majority of the members of Alabama's Congressional delegation also wrote requesting an extension of the comment period in order to ensure sufficient time to evaluate the proposed listing and supporting data. By letter of November 5, 2014, EPA granted an extension of the comment period to January 20, 2015. ADEM now submits its comments.

Initial Request for State Concurrence

While not required by either CERCLA or EPA regulations, EPA has established that it should determine the position of the State on sites that EPA is considering for NPL². EPA requested the State's concurrence in a letter to ADEM in April 2014³. In its response to EPA's request⁴, ADEM clearly indicated it did not object to EPA's proposed listing in the event that EPA was able to reach an agreement

¹ Memo from Timothy Fields, Acting Assistant Administrator OSWER to Regional Administrators. July 25, 1997.

² Memo from Elliot P. Laws, Assistant Administrator OSWER, to EPA Regional Administrators. November 14, 1996.

³ Letter from Franklin E. Hill, Superfund Division Director, EPA Region 4 to Phillip D. Davis, Chief of Land Division, ADEM. April 2, 2014.

⁴ Letter from Lance R. LeFleur, ADEM Director to Heather McTeer Toney, USEPA Region 4 Administrator. June 11, 2014, EPA Docket ID No. EPA-HQ-SFUND-2014-0623-0003.

Birmingham Branch
110 Vulcan Road
Birmingham, AL 35209-4702
(205) 942-6168
(205) 941-1603 (FAX)

Decatur Branch
2715 Sandlin Road, S. W.
Decatur, AL 35603-1333
(256) 353-1713
(256) 340-9359 (FAX)



Mobile Branch
2204 Perimeter Road
Mobile, AL 36615-1131
(251) 450-3400
(251) 479-2593 (FAX)

Mobile-Coastal
3664 Dauphin Street, Suite B
Mobile, AL 36608
(251) 304-1176
(251) 304-1189 (FAX)



with Potentially Responsible Parties (PRPs) to remediate the site or be able to prevail in an enforcement action. Based on EPA's decision to propose the listing and subsequent communications between EPA and ADEM, it is clear that EPA erroneously interpreted ADEM's response as a type of "*conditional concurrence*"⁵. This was not the Department's intention.

35th Avenue Site Characteristics

The 35th Avenue Site is atypical compared to most other NPL sites in the nation in that it is primarily composed of residential areas in an urban, industrial setting that is targeted for redevelopment. Over the years, EPA has used the NPL as a means of ranking either discrete, contaminated industrial sites or areas of acknowledged public health threats, such as public water supplies for remediation under Superfund. As EPA is aware, a number of community action organizations are working to revitalize the North Birmingham area. If the 35th Avenue Site is listed on the NPL, private sector revitalization efforts can be expected to languish and home values and job opportunities can be expected to decline until there is a clear path for funding the remediation of this Site and perhaps until remediation is completed.

Comparison of 35th Avenue Site to Other Proposed NPL Sites

It should be noted that unlike in the 35th Avenue Site, the states of Indiana and Michigan were fully in favor of the proposed NPL listings that were also published in the September 22, 2014 Federal Register. Furthermore, at the 35th Avenue Site, the Agency for Toxic Substances and Disease Registry (ATSDR) conducted a health consultation which found no significant health risks due to soil and air exposures at the Site. Copies of the studies by ATSDR are attached⁶. Conversely, the sites in Michigan and Indiana do not have similar documented studies of no significant health threat. In the Indiana case, there was, in fact, an impacted groundwater exposure pathway which is a public water supply which likely influenced that state's concurrence.

Current Status Regarding PRPs

To date, EPA has not reached any agreement with the PRPs to remediate the Site and has not filed an enforcement action to compel cleanup activities or provide adequate funding to support the cleanup effort. Furthermore, EPA has not yet provided ADEM with compelling scientific evidence to support EPA's theories regarding the causal link between the historic practices of the identified PRPs and any contamination found at the 35th Avenue Site. It appears EPA's work to identify PRPs is ongoing.

⁵ Email from Heather McTeer Toney, USEPA Region 4 Administrator to Lance R. LeFleur, ADEM Director. October 1, 2014.

⁶ See ATSDR, Evaluation of Air Exposures in Communities Adjacent to the 35th Avenue Site, Birmingham, Alabama (EPA FACILITY ID: ALN000410750) (June 26, 2014), available at http://www.atsdr.cdc.gov/HAC/pha/NorthBirminghamAirSite/35th%20Avenue%20Site_PHA_PC_06-26-2014_508.pdf and ATSDR, Assessment of Soil Exposures in Communities Adjacent to the Walter Coke Inc. Site (a/k/a 35th Avenue Coke Site) (EPA FACILITY ID: ALN000410750) (Aug. 1, 2013), available at [http://www.atsdr.cdc.gov/HAC/pha/WalterCokeInc/WalterCokeIncHC\(Final\)08012013_508.pdf](http://www.atsdr.cdc.gov/HAC/pha/WalterCokeInc/WalterCokeIncHC(Final)08012013_508.pdf).

Availability of Funding for Remediation

If EPA is unable to persuade or compel PRPs to conduct or fund the cleanup effort, then, under federal law, any remediation would have to be “fund-lead” and the State of Alabama must provide 10% of the remedial costs for the cleanup efforts and 100% any ongoing costs associated with long-term maintenance of any remedial systems. As was indicated in ADEM’s June 2014 letter, no such source of the potential cost-share exists. Moreover, ADEM is not authorized to obligate the State of Alabama to provide funding ADEM does not presently have in its budget; such authority lies instead with the Legislature and the Governor.

ATSDR Findings Do Not Support NPL Listing

ATSDR has determined that soil exposures in the sampled properties within the 35th Avenue Site do not present a public health hazard⁷ and that the levels of applicable contaminants in the air are not likely to result in harmful health effects⁸. Furthermore, ATSDR has not issued a health advisory that recommends dissociation of individuals from the area. This is one of the three criteria for determining a site’s eligibility for NPL listing⁹. Given ATSDR’s negative findings, securing any type of State match funding to support a fund-lead cleanup effort will likely not be possible.

JCDH Findings Do Not Support NPL Listing

The Jefferson County Department of Health (JCDH) has determined that the overall death rates for relevant cancers, asthma, and Chronic Obstructive Pulmonary Disease (COPD) were statistically the same for the residents of North Birmingham as the rest of Jefferson County. Likewise, JCDH determined the rates for infant mortality, stillbirths, and the occurrence of birth defects were statistically the same for the residents of North Birmingham as the rest of Jefferson County. A copy of the 2014 JCDH Death Rates Report is attached¹⁰. Given JCDH’s findings, securing any type of State match funding to support a fund-lead cleanup effort will likely not be possible.

Alternatives to Proposed NPL Listing

Based upon the ATSDR Reports and the findings of the JCDH, it cannot be argued that there is an imminent risk to the health of the general population in the North Birmingham area. Because there is no imminent threat, there is both the opportunity and the obligation to carefully consider more effective

⁷ *Health Consultation. Assessment of Soil Exposures in Communities Adjacent to the Walter Coke, Inc. Site.* ATSDR. August 1, 2013.

⁸ *Public Health Assessment. Evaluation of Air Exposure in Communities Adjacent to the 35th Avenue Site.* ATSDR. June 2014.

⁹ 40 CFR 300.425(c)(3)(i)

¹⁰ Summary of the Comparison of Death Rates and Birth Outcomes of African-Americans Living in Collegeville, Fairmont and Harriman Park to African Americans Living in the Rest of Jefferson County, Alabama (August 6, 2014) (hereinafter, “2014 JCDH Death Rates Comparison Report”).

alternatives to listing the site on the NPL. For example, in Anniston, Alabama, EPA and ADEM jointly oversaw a multi-year effort to cleanup lead contamination from residential neighborhoods very similar to those of the 35th Avenue Site. The Anniston Lead Site was never placed on NPL, yet this partnership among the agencies and the industrial facilities resulted in an extremely successful remediation effort. More recently in Spartanburg, SC, EPA oversaw the cleanup of the Arkwright Dump while supporting a major community revitalization effort and avoiding the stigma of an NPL listing in the residential areas of Spartanburg. EPA should exhaust all alternatives such as those mentioned above before formally tagging the communities of North Birmingham as a "Superfund Site," particularly in light of ATSDR's finding of no significant health threat.

Process Employed by EPA in Proposed NPL Listing

For all the foregoing reasons, ADEM has not concurred with the proposed NPL listing¹¹. EPA's 1997 *Fields Memo* describes the process that will be used where EPA recommends a site for NPL listing without State concurrence. The process called for in the *Fields Memo* was not followed.

Proposed Action

ADEM concludes it is necessary that the option for withdrawal of the proposed NPL listing referenced in Assistant Administrator Stanislaus' December 4, 2014 letter to Alabama Attorney General Luther Strange¹² must be exercised and that no further action should be taken on this matter until the issues raised by the State can be properly resolved. As set forth in separate correspondence¹³ asserting and preserving their rights under the *Fields Memo*, if EPA does not withdraw the proposed listing, the State and ADEM will pursue the issue resolution process pursuant to the *Fields Memo*, as well as any other administrative remedies available.

The Department stands ready to work with EPA, local elected officials, and area industries to undertake a collaborative process to address the 35th Avenue Site that will address the remediation of the Site and provide other positive benefits to the North Birmingham community. EPA has already publicly endorsed the idea of a collaborative process in North Birmingham and ADEM agrees that a collaborative public private partnership is the most effective way to address the issues at this Site.

Thank you for the opportunity to provide these comments. Please contact Phillip Davis of my staff at 334-271-7732 (email pdd@adem.state.al.us), or you may contact me directly at 334-271-7710 (email llefleur@adem.state.al.us) should you have any questions.

¹¹ Email from Lance R. LeFleur, ADEM Director to Gina McCarthy, EPA Administrator. September 16, 2014.

¹² Letter from Mathy Stanislaus, USEPA Assistant Administrator to Luther Strange, Alabama Attorney General. December 4, 2014.

¹³ Letter from Lance R. LeFleur, ADEM Director to Heather McTeer Toney, USEPA Region 4 Administrator. January 8, 2015.

Sincerely,

A handwritten signature in black ink, appearing to read "Lance R. LeFleur", written in a cursive style.

Lance R. LeFleur
Director

Attachments: Electronic (3)
Hard Copy (0)

cc: Mathy Stanislaus, USEPA Assistant Administrator
Ms. Heather McTeer Toney, USEPA Region 4 Administrator
Honorable Robert J. Bentley, Governor, State of Alabama
Honorable Luther Strange, Attorney General, State of Alabama
Honorable William A. Bell, Mayor, City of Birmingham, Alabama